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No. 92-6921

In The

Supreme Court of the United States

October Term, 1993

JOHN PATRICK LITEKY, CHARLES JOSEPH LITEKY, AND ROY LAWRENCE BOURGEOIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' BRIEF

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QUESTION PRESENTED

WHETHER 28 U.S.C. § 455(a), WHICH PROVIDES THAT "ANY JUDGE . . . SHALL DISQUALIFY HIMSELF IN ANY PROCEEDING IN WHICH HIS IMPARTIALITY MAY REASONABLY BE QUESTIONED," REQUIRES THAT THE CAUSE OF THE APPEARANCE OF BIAS STEM FROM AN EXTRA-JUDICIAL SOURCE?

Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847 (1988)

United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990)

United States v. Coven, 662 F.2d 162 (2d Cir. 1981, *cert. denied*, 456 U.S. 916 (1982)

PARTIES TO PROCEEDING

The following persons have an interest in the outcome of this case.

Petitioner John Patrick Liteky

Petitioner Charles Joseph Liteky

Petitioner Roy Lawrence Bourgeois

United States Department of Justice

Judge L. Robert Elliott

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES:

TABLE OF AUTHORITIES – Continued

RULES AND REGULATIONS:

LEGISLATIVE MATERIALS:

PERIODICALS:

MISCELLANEOUS:

OPINION BELOW

This appeal arises from the judgment of the Eleventh Circuit Court of Appeals dated September 28, 1992 which affirmed the decision of the United States District Court for the Middle District of Georgia. *United States v. Liteky*, 973 F.2d 910 (11th Cir. 1992).

JURISDICTION

Petitioners John Liteky, Charles Liteky and Roy Bourgeois were convicted of willfully injuring federal property in violation of 18 U.S.C. § 1361. They were sentenced to guideline terms of six months, six months and 18 months, respectively. The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court in a published opinion filed September 28, 1992. This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Title 28, U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

On November 16, 1990, Father Roy Bourgeois, a Catholic priest, Charles Liteky, a former Catholic priest and Congressional Medal of Honor recipient, and John Liteky, a peace activist and former seminarian, entered Fort Benning Military Reservation, accompanied be members of the media. *See* Trial Transcript, *United States v. Liteky*, Case No. 91-93-COL, 251-52 (M.D. Ga. Mar. 25, 1991) ("1991 Trans."). While on the premises of the Fort Benning Military Reservation, defendants poured blood on the Army School of the Americas to protest the killings of six Jesuit priests, their housekeeper and her daughter in El Salvador on November 16, 1989 by School of the Americas trainees.[1]

For this conscience-motivated, nonviolent act of civil disobedience, defendants were charged with willfully injuring property of the United States in violation of 18 U.S.C. § 1361. Judge J. Robert Elliott presided over the defendants' joint jury trial. Both during pretrial motions and during the course of the trial, defendants moved for Judge Elliott to recuse himself pursuant to 18 U.S.C. § 455(a). The court denied the pretrial motion by written order. Order on Defendants' Motion to Recuse (Feb. 25, 1991) (Appendix to Petition for a Writ of Certiorari ("Pet. for Cert.") at A19-A20). Judge Elliott also denied the Defendants' Motion For Recusal made during trial from the bench. 1991 Trans. at 201.

[1] The three defendants also distributed literature at the School of the Americas that day which described in detail the reason the defendants poured blood on government property. 1991 Trans. at 180-81, 188-91, 196-200. The defendants undertook their actions at the School of the Americas with the purpose of "making holy that place with a relic from the martyrs." 1991 Trans. at 270-71.

Defendants' pretrial recusal motion was predicated, in large part, upon the transcript of a 1983 prosecution of Father Bourgeois and his codefendants before Judge Elliott. Defendants' Motion to Recuse (filed February 4, 1991) (Joint Appendix, p.2). The 1983 bench trial involved similar acts of civil disobedience. The government charged Father Bourgeois with a series of petty misdemeanors committed at the Fort Benning Military Reservation in protest over the government's policies in El Salvador.[2]

Defendants' pretrial Motion for Recusal alleged that Judge Elliott's conduct in the course of the 1983 trial would lead an objective observer to reasonably question Judge Elliott's impartiality in conducting defendants' 1991 trial.[3] *Id.* Judge Elliott denied the motion without even considering Father Bourgeois' claim that the 1983 trial gave rise to an appearance of bias. Order on Defendants' Motion to Recuse (Feb. 25, 1991) (Appendix to Pet. for Cert. at A19). Judge Elliott refused to consider Defendants' Motion for Recusal because he believed that "all allegations of bias resulting from that [1983] trial arise out of matters occurring during the course of that case.

[2] Father Bourgeois was convicted in 1983 for trespass on government property, unlawfully wearing a military uniform and misdemeanor assault.

[3] The events at both the 1983 and 1991 trials which would lead an objective observer to doubt Judge Elliott's impartiality are more thoroughly discussed in Part ID, *infra*.

Matters arising out of the course of judicial proceedings are not a proper basis for recusal under . . . Title 18 [sic] United States Code Section 455." *Id.* (citations omitted).

Counsel for Father Bourgeois also moved for Judge Elliott's recusal during the course of the 1991 trial as a result of Judge Elliott's unfortunate and unnecessarily demeaning and confrontational attitude towards the defendants at that trial. 1991 Trans. at 201. The jury selection, the opening statements, the prosecution's case and the defendants' case were consistently punctuated, usually without objection from the prosecution, by Judge Elliott's interruptions and demeaning comments toward the defense. Following one of Judge Elliott's comments, which gave rise to a reasonable doubt as to his ability to conduct the proceedings in an impartial manner, Father Bourgeois' attorney renewed Defendants' Motion to Recuse, stating "the court indicated that it would not consider matters arising out of the course of judicial proceedings. . . . I would submit to the court that based on a proper analysis of the recusal motion that the proper standard for the Court to look at under 455 would be to include matters arising in judicial proceedings." 1991 Trans. at 202. The court denied defendants' motion without explanation. 1991 Trans. at 203.

Following a one and one-half day jury trial, Father Bourgeois and the Litekys were convicted of willfully injuring property of the United States. Judge Elliott

sentenced each of them, on June 21, 1991, to guideline prison terms.[4]

Defendants thereupon appealed their convictions to the United States Court of Appeals for the Eleventh Circuit, alleging that Judge Elliott had erroneously refused to consider whether his conduct during the 1983 trial of Father Bourgeois gave rise to an appearance of impropriety and that his conduct during the 1991 trial deprived the defendants of a fair trial. The Eleventh Circuit affirmed defendants' convictions. *United States v. Liteky,* 973 F.2d 910 (11th Cir. 1992).

The Supreme Court granted certiorari to consider whether an appearance of bias which arises in the course of judicial proceedings can require recusal under 28 U.S.C. § 455(a).

ARGUMENT

A guarantee of an impartial judge is essential to a fair and effective judicial system. *Ward v. Village of Monroeville,* 409 U.S. 57, 62 (1972) (Constitution requires a neutral and detached judge); *In re Murchison,* 349 U.S. 133, 136 (1955). In addition to guarding against judicial bias-in-fact, Congress has been vigilant to ensure the "appearance of impartiality." H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S.C.C.A.N., 6351, 6354 ("House Report"). "[T]he protection of the integrity

[4] Father Bourgeois received an 18 month prison term for his act of civil disobedience. The Litekys each received six months. All three defendants have served their prison terms.

and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (quoting *United States v. Columbia Broadcastinq Sys., Inc.*, 497 F.2d 107, 109 (5th Cir. 1974)); *see also Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 865 (1988) ("it is critically important . . . to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality"). The "appearance of impartiality is virtually as important" to the smooth functioning of a fair judicial system as is the fact of impartiality. *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977).

To ensure freedom from both bias-in-fact and the appearance of bias, Congress has adopted two alternate and independent statutes which require judicial disqualification for bias. 28 U.S.C. § 144; 28 U.S.C. § 455. In 1911, Congress adopted 28 U.S.C. § 144, which provides,

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Courts have uniformly held that the language "personal bias or prejudice" in § 144 required recusal only for

bias personally acquired, as opposed to judicial bias. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).[5]

In 1974, Congress amended § 455 to "improve judicial machinery by . . . broaden[ing] and clarify[ing] the grounds for judicial disqualification." House Report at 6357. Section 455 provides, in pertinent part,

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a).

Section 455(a), as amended, abandoned the "duty to sit" rule, which urged judges to resolve questions of recusal in favor of a "duty to sit." House Report at 6355. The new § 455(a) requires a judge to recuse herself in any proceeding in which her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). Indeed, § 455(a) recognizes that the appearance of impartiality is so central to notions of justice that any question of bias is sufficient to require recusal under that section. *See Liljeberg*, 486 U.S. at 861 (requiring recusal even where judge was unaware of disqualifying circumstances). *Roberts v. Bailar*, 625 F.2d

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[5] The amended 28 U.S.C. § 455(b)(1) also limits motions for recusal brought under that section to motions predicated on "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1) (1993). Courts have similarly construed the phrase "personal bias or prejudice" in § 455(b)(1) as referring only to bias or prejudice acquired outside a judicial proceeding. *See, e.g., United States v. Page*, 828 F.2d 1476, 1481 (10th Cir.), *cert. denied*, 484 U.S. 989 (1987); *United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

125, 129 (6th Cir. 1980) (disqualification required even where question is close); *Potashnick*, 609 F.2d at 1111 ("[a]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions").

In the case at Bar, Judge Elliott displayed an appearance of bias against Father Bourgeois and his codefendants as a result of his participation in a previous case involving Father Bourgeois. Defendants twice asked Judge Elliott to consider recusing himself to avoid the appearance of impropriety created by his participation in prior proceedings. Judge Elliott declined even to consider the allegations of appearance of bias, relying on ill-reasoned Fifth Circuit opinions which hold that 28 U.S.C. § 455(a) does not require recusal for bias obtained during the course of judicial proceedings. Order on Defendants' Motion to Recuse (citing *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958 (5th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980) and *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)).

Because Judge Elliott's decision not to consider Defendants' Motion for Recusal rested on an interpretation of § 455(a) that is inconsistent with the wording, history and policy underlying that section, defendants' convictions should be reversed and the case remanded for retrial before a different judge. Judge Elliott's error is an "ice cold" issue of law. *See United States v. Chantal*, 902 F.2d 1018, 1019 n.1 (1st Cir. 1990). This Court, therefore. should review that decision *de novo*.

I. APPEARANCE OF BIAS WHICH ARISES IN THE COURSE OF JUDICIAL PROCEEDINGS REQUIRES RECUSAL UNDER 28 U.S.C. § 455(a)

Whether 28 U.S.C. § 455(a) requires that a judge's bias stem from a nonjudicial source has been a matter of considerable scholarly and jurisprudential debate over the last several years. *See, e.g.*, Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 38 Case Western Reserve L. Rev. 662, 670-76 (1985) ("Bloom, *Judicial Bias*"); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 Temple L.Q. 697, 714-17 (1987) ("Hoekema, *Questioning Impartiality of Judges*"); Randall J. Litteneker, Note, *Disqualification of Federal Judges for Bias and Prejudice*, 45 U. Chi. L. Rev. 236, 254-57 (1978) ("Litteneker, *Disqualification of Federal Judges*").

The United States Circuit Courts of Appeal are irreconcilably divided over whether bias which results from a judge's involvement in judicial proceedings concerning parties to a later action can require recusal under 28 U.S.C. § 455(a). *See Waller v. United States*, 112 S. Ct. 2321 (1992) (White, J., dissenting from denial of certiorari) (describing circuit split concerning application of the extra-judicial source requirement to 28 U.S.C. § 455(a)).

The First and Second Circuits have authored decisions explaining that the 1974 amendments to § 455(a) abandoned the extra-judicial source requirement. *See, e.g., United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990); *United States v. Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978); *United States v. Coven*, 662 F.2d 162, 168 (2d Cir.

1981), *cert. denied*, 456 U.S. 916 (1982). In *Chantal*, Judge John Brown, sitting by designation from the Fifth Circuit, offered the most thorough and well-reasoned analysis of whether appearance of bias acquired in the courtroom requires recusal under § 455(a). 902 F.2d at 1019-23.

At a 1987 sentencing hearing, the district judge in *Chantal* strongly condemned the defendant for his role in a drug-related incident. *Id.* at 1019-20. Chantal was subsequently indicted again on similar grounds and his case was assigned to the same judge. Chantal then filed a motion urging the trial judge to recuse himself, alleging that his forceful remarks made at the sentencing hearing raised a substantial question as to his impartiality. *Id.* at 1020. The trial judge declined to recuse himself and shortly thereafter Chantal entered a plea of guilty to the second indictment. *Id.*

The First Circuit reversed defendant's conviction, finding that the district court had applied the wrong standard in considering Chantal's recusal motion. *Chantal* unequivocally explained that "the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings." *Id.* at 1022.

Similarly, in *Coven*, the Second Circuit held that § 455(a) "does not contain the requirement that to be disqualifying bias must spring from an extrajudicial source." 662 F.2d at 168. The conclusions reached by the *Chantal* and *Coven* courts are consistent with commentators' interpretations of the statute. All commentators to consider the issue agree that § 455(a) also applies to bias which arises during the course of judicial proceedings. Bloom, *Judicial Bias*, at 670-76; Hoekema, *Impartiality of*

Judges at 715-17; Litteneker, *Disqualification of Federal Judges*, at 254-57.

In contrast, the Fourth, Fifth, Seventh, Ninth, Eleventh and District of Columbia Circuits have insisted that appearance of bias which arises as a result of a judge's participation in a prior judicial proceeding does not require recusal under § 455(a). *See, e.g., United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *Corrugated Container Antitrust Litig.*, 614 F.2d at 964-65; *Davis*, 517 F.2d at 1051-52; *United States v. Bond*, 847 F.2d 1233, 1241 (7th Cir. 1988); *United States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980); *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990); *United States v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992).

Some courts have construed 28 U.S.C. §§ 144 and 455(a) *in pari materia* and, therefore, applied § 144's requirement that any bias be "personally," as opposed to judicially, acquired. *Davis*, 517 F.2d at 1052; *Corrugated Container Antitrust Litig.*, 614 F.2d at 965. Others have concluded that § 455(a) should be read in conjunction with § 455(b)(1), which also permits recusal for only "personal" or nonjudicial bias. *Sibla*, 624 F.2d at 867. Most courts which have concluded that appearance of bias which arises in the course of a judicial proceeding is irrelevant for recusal inquiry under § 455(a), however, have offered absolutely no justification for this approach. Rather, many of the decisions which parrot the extrajudicial source requirement simply chant the familiar, but misguided, mantra: "a judge's rulings in the same or a

related case may not serve as the basis for a recusal motion." *McWhorter*, 906 F.2d at 678; *see also Mitchell*, 886 F.2d at 671; *Bond*, 847 F.2d at 1241.

Other circuits have manifested some confusion as to whether § 455(a) requires extra-judicial bias or have authored inconsistent rulings. For example, *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990), *denial of post conviction relief aff'd*, 963 F.2d 373 (6th Cir. 1992), *petition for cert. filed*, No. 92-8935 (U.S. Jan. 4, 1993), in conclusory fashion, insisted that "prejudice or bias must be personal or extrajudicial in order to justify recusal under § 455(a)." This decision, however, is inconsistent with prior opinions in *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 156-57 (6th Cir. 1979) and *Roberts v. Bailar*, 625 F.2d 125, 128-30 (6th Cir. 1980). *Nicodemuss*, on the basis of § 455(a), disqualified the district judge from participating further in the proceedings as a result of statements at a pretrial hearing that reflected an appearance of bias. 596 F.2d at 157, n.10. Similarly, in *Roberts*, the trial judge's statements at a pretrial hearing gave rise to a duty to recuse himself under § 455(a). 625 F.2d at 129.

United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989) stated flatly, without accompanying analysis, "recusal must be predicated on extra-judicial conduct." This decision stands in stark contrast to the Tenth Circuit's prior opinion in *Webbe*, which found that the district court's pronouncement at a hearing on pretrial dispositive motions that the defendant insurance company was "stuck," before permitting counsel for the insurance company to address the court, gave rise to an appearance of partiality. 549 F.2d at 1361. *Webbe* found

that the district judge was disqualified from further proceedings in the case under § 455(a) despite the fact that his appearance of bias arose directly as a result of his participation in a judicial proceeding.[6]

Of all decisions to address this issue, the *Chantal* and *Coven* opinions are the most persuasive. The statutory language, legislative history and purpose of § 455(a) do not support a distinction between judicial and non-judicial bias as the basis of a motion for recusal. The central issue under § 455(a) should be whether there is a question about the district judge's appearance of bias against one of the parties in the case at trial, not where that bias arose. Consequently, the Court should avail itself of this opportunity to reject the extra-judicial source requirement.

A. The Language of 28 U.S.C. § 455(a) Supports An Interpretation That Any Reasonable Question As To a Judge's Impartiality, Regardless of Source, Requires Disqualification

The plain language of § 455(a) *requires* recusal *any* time that the statutory criteria are met. *Liljeberg*, 486 U.S. at 861; *Potashnick*, 609 F.2d at 1111. The text of § 455(a)

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[6] The Third and Eighth Circuits have apparently not addressed the extra-judicial source requirement under § 455(a). Two well-reasoned district court decisions in the Eighth Circuit, however, found that appearance of bias which arises in the course of a judicial proceeding requires recusal under § 455(a). *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 234 (W.D. Mo. 1985); *United States v. Singer*, 575 F. Supp. 63, 67-68 (D. Minn. 1983).

does not purport to limit this requirement to situations where an appearance of bias arose outside a court room. *Cf. Liljeberg*, 486 U.S. at 859 ("[t]o read § 455(a) to provide that the judge must know of the disqualifying fact, requires . . . ignoring the language of the provision – which makes no mention of knowledge"). Furthermore, Congress's choice of certain words in drafting § 455(a) reflects its desire to abandon the extra-judicial source requirement of § 144.

"[U]se of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know *all the circumstances*, would harbor doubts about the judge's impartiality." *Potashnick*, 609 F.2d at 1111 (emphasis added). In § 455(a), Congress clearly did not intend to limit the circumstances which require recusal to those which occur in an extra-judicial setting. If Congress had intended to so limit the circumstances requiring recusal, it would have used language similar to § 144; language very different from that of § 455(a).

Prior to the 1974 amendments to 28 U.S.C. § 455, courts recognized that the term "personal" bias or prejudice in § 144 only applied to bias that a judge acquired off the bench. *Grinnell Corp.*, 384 U.S. at 583; *see also United States v. Page*, 828 F.2d at 1481 (construing the "personal knowledge" requirement of 28 U.S.C. § 455(b)(1)). Thus, under § 144, for "[t]he alleged bias and prejudice to be disqualifying [it] must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Grinnell Corp.*, 384 U.S. at 583.

Importantly, § 455(a) does not include language which requires a "*personal* bias or prejudice." 28 U.S.C. § 455(a). The absence of the modifier "personal" in § 455(a) is significant because Congress amended that section in light of the long line of cases holding that "personal," as used in § 144, implied "extra-judicial." *Coven*, 662 F.2d at 167-68 (citing *Grinnell Corp.*, 384 U.S. at 583 and *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976)). *Coven* found that "[a]gainst this background, it is clear that by amending § 455 Congress intended to transfer the extrajudicial bias limitation contained in § 144 to § 455(b)(1)" by including the phrase "personal bias or prejudice." 662 F.2d at 168. The Court went on to point out, however, that "[s]ection 455(a) does not contain the term 'personal' found in § 455(b)(1)." *Id.* Recognizing this distinction, the Second Circuit maintains that a judge's conduct in proceedings before her can form a basis for recusal. *Id.*

Congress's decision not to require personal bias for the purposes of § 455(a) reflected a calculated decision to expand the scope of recusal and to abandon the extra-judicial source requirement. Consistent with this interpretation, the text of § 455(a) is sweeping, requiring recusal "in any proceeding in which [a judge's] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This broad language reflects Congress' desire to avoid the appearance of bias, regardless of the setting in which it rears its head. *Chantal*, 902 F.2d at 1023-24.

B. The History of 28 U.S.C. § 455(a) Demonstrates Congress' Intent to Abandon the Extra-Judicial Source Requirement

Section 455(a) reflects Congress' intent to ensure that all parties receive a fair trial, free of any appearance of judicial bias. *See Liljeberg*, 486 U.S. at 860. The amendments to § 455(a) liberalized the recusal process in a number of ways.

First, the 1974 amendments changed § 455(a) to ensure that disqualification decisions were based on an objective, reasonable person standard, rather than a judge's subjective determination of bias. *Chantal*, 902 F.2d at 1022. The amended § 455(a) also requires a district judge to recuse herself wherever any question about the court's impartiality arises. Under the new § 455(a), "[e]ven where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial." *Roberts*, 625 F.2d at 129. Given Congress' stated desire to broaden the grounds for recusal, it is unreasonable to assume that, without explicitly stating, Congress intended to exclude from consideration all bias which arises in the course of a judicial proceeding.

Furthermore, the 1974 amendments were concerned, above all else, with the *appearance* of impartiality.[7] House Report at 6355; *Liljeberg*, 486 U.S. at 861. Neither Congress, nor any of the courts which have applied the extra-judicial source requirement to § 455(a), have articulated a

[7] Prior to the 1974 amendments, recusal under § 144 was governed by a "bias-in-fact" standard. House Report at 6355.

basis for the belief that an appearance of bias which arises in a judicial setting is any less a threat to the public's confidence in the judiciary than an appearance of bias which arises from a judge's personal activities.

Moreover, Congress explained that subsection (a) of § 455 is a "catch-all" provision. House Report at 6354. It is difficult to imagine how § 455(a) could effectively function as a "catch-all" if an entire category of bias, that acquired through participation in judicial proceedings, is *per se* excluded from consideration on motion for recusal.

That Congress intended § 455(a) to apply as a "catch-all" also suggests that the Ninth Circuit decisions, and those decisions which have followed Ninth Circuit precedent, are wrongly decided. The Ninth Circuit bases its application of the extra-judicial source requirement to § 455(a) on the erroneous assumption that §§ 455(a) and 455(b)(1) do not contain separate and independent grounds for recusal. *Sibla*, 624 F.2d at 867. To the extent that § 455(a) is a "catch all," it is clear that Congress intended the section to be not only independent of § 455(b)(1), but also considerably broader. For this reason it is inappropriate for courts, without express authorization from Congress, to read the language "personal bias and prejudice," contained in § 455(b)(1), into § 455(a). *Cf. Liljeberg*, 486 U.S. at 859 n.8 (declining to construe § 455(a) in light of § 455(b)(4)'s scienter requirement).

The legislative history of the 1974 amendments to § 455 also exposes the inadequacies of the *Davis* and *Corrugated Container Antitrust Litigation* decisions, the only other opinions which articulate any justification for imposing an extra-judicial source requirement. *Davis*, 517

F.2d at 1051-52; *Corrugated Container Antitrust Litig.*, 614 F.2d at 965. These decisions are premised on the assumption that §§ 144 and 455 should be read *in pari materia. Id.* This rationale, however, fails for the simple reason that these two sections are not, and were never intended to be, *in para materia.*

It is difficult to imagine how any court could reason that §§ 144 and 455, adopted 63 years apart, should be read as companion legislation. *See* Bloom, *Judicial Bias* at 675-76. Moreover, since Congress's avowed purpose in amending § 455 was to liberalize procedures and broaden the grounds for recusal, it is clear that Congress did not intend the same legal standards to apply to both sections. *Chantal*, 902 F.2d at 1023-24. Indeed, for the most part, courts have not applied the same legal standards.[8]

Finally, §§ 144 and 455(a) contain different procedural requirements. Section 455(a) is self-enforcing and does not require an affidavit or motion of party. Section 144 requires the execution of an affidavit by the party moving for recusal. *United States v. Alabama*, 828 F.2d at 1540-41.

The Fifth Circuit decisions which impose an extra-judicial source requirement are incorrect in assuming that

[8] Although § 144 requires recusal only where there is evidence of actual bias, § 455(a) applies to require disqualification for an appearance of bias. *Liljeberg*, 486 U.S. at 861. Although § 144 permits a judge to subjectively determine his own bias, § 455(a) applies an objective test. House Report at 6354-55.

§§ 144 and 455(a) are governed by the same legal standards.[9] Rather, Congress enacted § 455(a) for the expressed purpose of creating different, and broader, standards to govern the recusal process. "Congress established by the detailed provisions of § 455(a) *an entirely new concept* of acceptable judicial disqualification." *Chantal*, 902 F.2d at 1021 (emphasis added).

C. Compelling Public Policy Considerations Justify Considering Judicially-Acquired Bias In Evaluating Motions For Recusal Brought Pursuant to 28 U.S.C. § 455(a)

In addition to flying in the face of the textual mandates of § 455 and the avowed intent of Congress, the extra-judicial source requirement, when applied to § 455(a), creates a rule of law inconsistent with both traditional notions of fairness and with the federal courts' inherent authority to disqualify judges for an appearance of bias or prejudice. "The appropriate focus under § 455(a) is not whether the judge's statement springs from an extra-judicial source but instead whether the judge's statement or action would lead a reasonable person to question whether the judge would remain impartial." Hoekema, *Questioning the Impartiality of Judges*, at 1717. Bias or prejudice against a party which arises in the course of a judicial proceeding is no less inimical to the

[9] For precisely these reasons, commentators have sharply criticized both the Fifth and Ninth Circuit Courts of Appeal decisions which have imposed an extra-judicial source requirement. Bloom, *Judicial Bias*, at 675-76; Hoekema, *Questioning the Impartiality of Judges*, at 248-49.

interests safeguarded by 28 U.S.C. § 455(a) than is bias which arises elsewhere. Similarly, in achieving the congressionally articulated goal of public confidence in the judicial system, it does not matter whether an appearance of impropriety arises on a golf course, at a cocktail party, in a Las Vegas bath house, or in a court of law. The prejudicial effect of an appearance of bias is identical regardless of where that bias arises and the remedy provided by § 455(a) should also be identical.

Judges and commentators alike have also raised concerns about the accountability of federal judges in a system which immunizes them from criticism for bias merely because it arises, or is displayed, in a courtroom. "[T]he fact that the source of the judge's bias arises out of or originates in judicial proceedings [does not] immunize the judge from the inquiry whether such factor would, in the mind of a reasonable person, raise a question about the judge's impartiality." *Chantal*, 902 F.2d at 1023-24; *see also* Hoekema, *Questioning the Impartiality of Judges*, at 715 (rigid application of the extra-judicial source requirement creates a "zone of immunity" in which to voice prejudice).[10]

If anything, an appearance of bias which arises at trial is more hazardous to the interests of justice than bias

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[10] This concern is particularly important because litigants are often familiar with judges only through their courtroom conduct. Excluding evidence of courtroom acquired bias deprives litigants of what is often their only opportunity to demonstrate that a particular judge is biased against them. The zone of immunity is especially troubling for Article III judges, who are appointed for life terms, without any degree of public accountability through the electoral process.

which arises elsewhere. When a judge joins sides, in the full view of the jury and the public, the parties, the jury and the public become "overawed . . . and confused." *Nicodemus*, 596 F.2d at 156 (quoting *Reserve Mining Co. v. Lord*, 529 F.2d 181, 186 (8th Cir. 1976)).

The extra-judicial source requirement is also inconsistent with the time-honored rule of law that courts of appeal have the inherent authority to disqualify judges from further participation in a case on remand, due to appearance of bias reflected in earlier proceedings. *See, e.g., Offutt v. United States*, 348 U.S. 11, 16-18 (1954) (establishing appellate courts' supervisory authority to order reassignment); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 97 (3rd Cir. 1992) (district judge's stinging criticism of the tobacco industry "contained in the opinion that is the subject of this petition" required disqualification on remand); *United States v. Jacobs*, 855 F.2d 652, 656 (9th Cir. 1988) (judge's conduct during trial raised the appearance of prejudice and required disqualification on remand). Consistent with its inherent authority, the Eleventh Circuit in *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1229-30 (11th Cir. 1993), disqualified Judge J. Robert Elliott because his courtroom conduct reflected a predisposition to rule against the plaintiff.

These decisions took pains to point out that the test for supervisory removal is the "appearance of impartiality." *Haines*, 975 F.2d at 98; *Jacobs*, 855 F.2d at 656-57; *see also Hermes Automation Technology, Inc. v. Hyundai Elecs. Indus. Co.*, 915 F.2d 739, 752 (1st Cir. 1990) (test for disqualification is "*appearance* of unfairness") (emphasis in original). Importantly, this is exactly the same standard for recusal under § 455(a). *Liljeberg*, 486 U.S. at 860.

Even those courts which apply an extra-judicial source requirement to recusal motions brought under § 455(a) recognize that, for the purposes of exercising their inherent authority to disqualify, it does not matter whether the appearance of a bias arises in a prior judicial proceeding. *Jacobs*, 855 F.2d at 656 & n.2. As a careful reading of *Jacobs* makes clear, this position is inconsistent and indefensible. *Jacobs* candidly admitted that if the facts it faced had arisen on motion for recusal pursuant to § 455(a), it would not have required the district judge's disqualification because the appearance of bias arose in the course of a judicial proceeding. 855 F.2d 656 n.2. Because the issue arose on appeal prior to remand, however, the court used its inherent authority to assign the case to a different judge. *Id.* at 656-57.

The *Jacobs* court's approach thus forbids a judge from even considering a motion to recuse for appearance of bias which arises in the course of judicial proceedings in the first instance, yet permits a court of appeals to exercise its inherent authority, on the same facts, and disqualify the district judge. This approach is, at best, inconsistent and, at worst, hypocritical.[11]

Additionally, courts which apply the extra-judicial source requirement to § 455(a) do so at the cost of judicial

[11] It is particularly ironic that the use of inherent authority to disqualify a district court judge is reserved for "extreme circumstances." *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir.), *cert. denied*, 493 U.S. 918 (1989). Section 455(a), in contrast, is designed to protect the appearance of impartiality wherever *"[a]ny question* of a judge's impartiality" is raised. *Potashnick*, 609 F.2d at 1111 (emphasis added).

efficiency. In the Ninth Circuit, for example, a district judge is forbidden to recuse himself on the basis of a motion brought under § 455(a) even if that judge recognizes that his views towards a particular party are tainted by participation in a prior judicial proceeding. *Cf., Jacobs* 855 F.2d at 656 n.2 (Section 455(a) did not permit recusal although the Ninth Circuit found appearance of bias).[12] Rather, a judge faced with that situation would be forced to preside over the litigation, only to face reversal and disqualification on appeal.[13]

[12] In this respect, *Jacobs* imposes a type of "duty to sit" on judges who would otherwise recuse themselves. *See also Waller*, 112 S. Ct. at 2322 (White, J., dissenting from denial of certiorari) (district judge acknowledged appearance of bias, but refused to recuse himself because it did not arise from an extra-judicial source). This result is irreconcilable with Congress's stated intention to abandon the duty to sit rule. House Report at 6355.

[13] Interestingly, the only policy based justification that any court has ever advanced for the extra-judicial source requirement is premised on efficiency grounds. *See Corrugated Container Antitrust Litig.*, 614 F.2d at 966 (decrying the notion of "no deposit/no return judges, disposable after one use"). While this concern may have had merit in 1911 when Congress originally enacted 28 U.S.C. § 144, such fears are purely phantom today. As the Fifth Circuit itself explained in a decision authored two months prior to the *Corrugated Container Antitrust Litigation* opinion,

> "we cannot ignore that the disqualification of a judge in any given case does not cause the delay or inconvenience which resulted in prior times. The growing number of federal judges, and the availability of rapid transportation to move those judges from place to place when necessary, make the decision to disqualify much less burdensome on the judicial system than in times past; any inconvenience which does

Perhaps because they recognize the inefficiency and unfairness of the extra-judicial source requirement, many courts, while purporting to uphold that requirement, have nonetheless found that a judge's conduct during trial can require recusal under § 455(a) in some circumstances. Even those courts of appeal which have reflexively adhered to the extra-judicial source requirement have found themselves forced to carve an exception for instances in which a judge's remarks demonstrate "pervasive bias or prejudice." *See e.g., McWhorter*, 906 F.2d at 678; *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989).

Thus, these courts recognize that bias acquired in the course of judicial proceedings can, on occasion, justify recusal. Notwithstanding, for no reason authorized by Congress, they hold that judicial bias constitutes grounds for recusal only in the most extreme circumstances. Nothing in § 455(a) justifies a recusal scheme which requires one threshold of appearance of bias when it arises outside a courtroom and a different, and more stringent, standard for bias arising in the course of judicial proceedings.[14]

The extra-judicial source requirement is at odds with the text, history and policy underlying § 455(a). Judge

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arise is more than outweighed by the need to protect the dignity and integrity of the judicial process." *Potashnick*, 609 F.2d at 1112.

[14] Judge Elliott never considered whether Defendants' Motion for Recusal presented evidence of bias sufficiently pervasive to require recusal under § 455(a). Thus, even under Eleventh Circuit law, Judge Elliott's refusal to consider defendants' motion was in error.

Elliott should have considered defendants' allegation that "[t]he trial of September 14, 1983 indicates [Judge Elliott's] impatience, disregard for the defense and animosity towards Father Bourgeois and his beliefs, as well as his similarly situated codefendants." *See* Defendants' Motion to Recuse. For the same reasons, Judge Elliott should have considered defendants' renewed motion for recusal midway through the 1991 trial. 1991 Trans. at 200-01. The Eleventh Circuit's opinion denying defendants' requested relief was similarly in error.

D. Reversal of Defendants' Convictions and Remand for a New Trial Before an Impartial Judge are the Appropriate Remedies for the Misapplication of the Extra-Judicial Source Requirement in This Case

Litigants, and criminal defendants in particular, are entitled to a judge free of bias or prejudice. *Tumey v. Ohio*, 273 U.S. 510 (1927). Where bias or appearance of partiality existed at the trial level, this Court will always reverse a defendant's conviction. *Id.* at 535; *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (error concerning judicial impartiality is never harmless). This basic tenet of our judicial system applies with equal force to errors of law committed in interpreting 28 U.S.C. § 455. *See Chantal*, 902 F.2d at 1020, 1024 (reversing defendant's conviction despite the fact that he was "caught red-handed in," and pled guilty to, the crime of which he was charged).

As one leading commentator has argued, "[t]here should be no room in [the recusal statutes] for the concept of harmless error to apply, nor for arguments to be

made that the judge in fact acted in an impartial manner. The disqualification statutes are mandatory and the failure of a judge to step aside if he is indeed disqualified under one of the three statutes should always require reversal." 13A Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice and Procedure*, § 3553 at 657 (2d ed. 1984).

This Court, within the bounds established by *Tumey* and *Chapman*, should establish the remedy for violation of Section 455(a). *Liljeberg*, 486 U.S. at 862. Petitioners request the Court to review the record and find an appearance of bias, reverse their convictions and remand for a new trial. At a very minimum, this Court should reverse petitioners' convictions and remand the case to the Eleventh Circuit to determine whether Judge Elliott's conduct at the 1983 trial, the 1991 trial, and in subsequent proceedings, raised an appearance of bias against Father Bourgeois and his codefendants. *Cf. Chantal*, 902 F.2d at 1024 (reversing defendant's conviction and remanding to district court for proper analysis under § 455(a)).

In *Liljeberg*, Health Services Acquisition Corporation discovered ten months after trial that the judge appeared to have had a serious conflict of interest. 486 U.S. at 850. The judge claimed to be unaware of the conflict at the time he rendered his decision. Although the Court accepted the judge's assertion that he was not aware of the conflict of interest, it vacated the judgment pursuant to Fed. R. Civ. P. 60(b) because it found that an objective observer could reasonably believe that the judge's conduct created an appearance of prejudice. 486 U.S. at 862-63. In reaching its decision, the Court emphasized

that "[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." 486 U.S. at 865.[15]

In this case, as in *Liljeberg*, this Court should determine that Judge Elliott's conduct requires his disqualification in any future proceedings, reverse defendants' convictions, and remand for a new trial. *Cf. Nicodemus*, 596 F.2d at 157 (court of appeals ordered district judge's recusal pursuant to § 455(a) on the basis of the trial record, without remanding the case to the district judge for reconsideration, even in the absence of a party's

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[15] The Eleventh Circuit has concluded that *Liljeberg* endorses harmless error analysis for errors committed in interpreting § 455. *United States v. Kelly*, 888 F.2d 732, 747 (11th Cir. 1989); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). These decisions, however, are based on a clear misunderstanding of *Liljeberg* and have been soundly criticized by commentators:

> [In *Liljeberg*], the Supreme Court was shaping an extraordinary remedy for extraordinary situations, and its willingness to do so indicates that violations of § 455(a) are a serious matter. This test was not created for use on direct appeal from a district court's refusal to disqualify herself. The *Liljeberg* opinion does not even remotely suggest or support the proposition that a judge's failure to recuse under § 455(a) may be harmless error. In fact, the opinion suggests quite the opposite – that the statute should be applied strictly.

Kenneth M. Fall, Note, *Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under § 455(a)*, 1989 Wisc. L. Rev. 1033, 1058 (1989).

request for recusal).[16] The record in this case requires such relief.

1. Judge Elliott's Conduct During Father Bourgeois' 1983 Trial Reflected An Appearance of Bias Against Him and His Codefendants

At the outset of the 1983 bench trial, Judge Elliott sternly lectured, before the trial had even begun, that the court was not a political forum. *See* Trial Transcript, *United States v. Ventimiglia*, C.A. No. 83-316-COL, 10 (M.D. Ga. Sept. 14, 1983) ("1983 Trans."). Later, Father Bourgeois' attorney cross-examined the alleged victim of the assault with which Father Bourgeois was charged concerning his reaction to Father Bourgeois' act of civil disobedience. Without objection from the prosecuting attorney, the court interrupted this legitimate line of inquiry.[17] 1983 Trans. at 100. Although the prosecution did not object to this cross-examination, which went to

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[16] Reversal and remand for a new trial would also be consistent with this Court's decisions concerning the inherent authority to disqualify trial judges. *Offutt*, 348 U.S. at 13-15.

[17] A trial judge may interrogate a witness to clarify the witness's testimony or to ensure that a case is fairly tried. It is well settled, however, that the trial judge is not permitted to assume the burden of cross-examination. *United States v. Singer*, 710 F.2d 431, 433-35 (8th Cir. 1983); *United States v. Bland*, 697 F.2d 262, 266 (8th Cir. 1983); *United States v. Daniels*, 572 F.2d 535, 541 (5th Cir. 1978). "A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. A trial court should never assume the burden of direct or cross-examination." *Bland*, 697 F.2d at 266. When an attorney is competently examining a witness, it is improper for the trial judge to question that witness. *Daniels*, 572 F.2d at 541.

one of the few disputed factual matters at trial, Judge Elliott undertook to argue with and finally direct defense counsel how to continue with his cross-examination. 1983 Trans. at 100.

The court also interrupted Father Bourgeois' attorney's cross-examination concerning the facts underlying the government's allegations of assault. Prior to Judge Elliott's interjection, the witness testified that Father Bourgeois hit him with an open hand. 1983 Trans. at 96. Judge Elliott, however, without any factual basis, led the witness to testify that Father Bourgeois hit him with a closed fist. 1983 Trans. at 109, 110. This unwarranted restriction on the scope of defendant's cross-examination and the leading of the prosecution's witness indicates that the Court was a government advocate, as opposed to an impartial referee. *Cf. Pfizer Inc. v. Lord*, 456 F.2d 532, 544 (8th Cir.) (requiring "scrupulous fairness and impartiality" in the conduct of litigation), *cert. denied*, 406 U.S. 976 (1972).

The Court's apparent bias against the defendant escalated during the presentation of the defense. The Court refused to hear evidence concerning Father Bourgeois' background, and instead insisted that Father Bourgeois' background information had nothing to do with the trial. 1983 Trans. at 142. The Court also interrupted Father Bourgeois during his testimony and argued with him concerning his testimony's content. 1983 Trans. at 146-7. These interruptions were not precipitated by objection from the prosecution.

During Father Bourgeois' closing argument, Judge Elliott again interrupted, again without objection from

the prosecution, and again admonished Father Bourgeois for testifying about his state of mind.[18] 1983 Trans. 152-53. Similarly, during the closing argument of Father Bourgeois' codefendant Rosebaugh, Judge Elliott not only interrupted without objection, but strongly criticized him for not taking the stand in his own defense. 1983 Trans. at 159-60.[19] An obviously intimidated Father Rosebaugh abandoned further argument.

Moreover, during the entire course of the 1983 trial, the court subtly manifested animosity toward Father Bourgeois by refusing to refer to him by his appropriate title: "Father." 1983 Trans. at 22, 35, 36, 38, 50, 58, 59, 60, 63, 66, 78, 93, 94. The court's discourtesy is highlighted by the fact that Judge Elliott nonetheless referred to numerous Army personnel as "sir" or "Colonel," 1983 Trans. at 26, 40, 47, 57, 69, 71, 133; and in fact addressed the Fort Benning priest as "Chaplain." 1983 Trans. at 64.

Judge Elliott also exhibited an appearance of bias against Father Bourgeois at sentencing. Fed. R. Crim. P. 32(c)(1) requires the court to conduct an investigation and issue a report prior to imposing sentence. The Court failed to order a presentence investigation and did not consider the kind of information called for under Rule 32

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[18] Father Bourgeois did not represent himself *pro se* throughout the 1983 trial, but he did give a closing argument in his own behalf. 1983 Trans. at 150-51.

[19] This condemnation was clearly in error. *See United States v. Griffin*, 380 U.S. 609 (1965) (judge should not comment unfavorably on defendant's decision to invoke self-incrimination privilege).

to make an informed and unbiased judgment as to sentence. In fact, the Court had refused to hear testimony concerning such matters at trial, including defendants' reasons for entering the base and evidence concerning their background, all of which was necessary for the Court to pass a fair sentence. *See, United States v. Hamm*, 786 F.2d 804 (7th Cir. 1984).

Moreover, Judge Elliott imposed a sentence of 18 months for Father Bourgeois' petty offenses by ordering the sentence for each misdemeanor be served consecutively. Imposing consecutive sentences under such circumstances is clearly improper. *See United States v. Bennett*, 623 F.2d 52 (8th Cir. 1980); *Borum v. United States*, 409 F.2d 433 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969). Given Father Bourgeois' ideological commitments, his justifications for committing the offenses charged, and the fact that all of his offenses arose from a similar pattern of conscientiously motivated conduct, the unduly harsh sentence, when considered in light of Judge Elliott's conduct throughout the entire trial, gives rise to an appearance of impropriety.

Taken as a whole, Judge Elliott's conduct went far afield from an appearance of impartiality. An objective observer, upon reviewing the 1983 Transcript, would have reason to doubt Judge Elliott's capacity to preside over a trial involving Father Bourgeois in a fair and unbiased manner.

2. Judge Elliott's Conduct During the Course of the 1991 Trial Reflects An Appearance of Bias Against the Defendants

Defendants' original motion to recuse was based solely on their belief that a reasonable person, reviewing Judge Elliott's conduct during the 1983 trial, would find an appearance of bias against Father Bourgeois and his codefendants. In evaluating the appropriate remedy in this case, however, the Court should consider not only the 1983 trial, but events during and after the 1991 trial as well. *Cf. Liljeberg*, 486 U.S. at 855-58 (ordering vacatur and recusal under § 455(a) on the basis of events which occurred following judgment); *Bland*, 697 F.2d at 266 (remarks made after verdict indirectly reveal judge's feelings throughout trial).

During the 1991 trial, Judge Elliott picked up where he left off in 1983. Judge Elliott evidenced an appearance of bias against the defendants through his assumption of cross-examination of certain key witnesses, the anti-defendant tone of his numerous interjections, and his actions in cutting off the defendants' testimony about their state of mind.[20]

It is clear from the record of the 1991 trial that neither Judge Elliott nor Father Bourgeois had forgotten the events of the 1983 trial. 1991 Trans. at 240-42. The court, *sua sponte*, interrupted defense counsel's direct examination of Father Bourgeois, probing the details of the 1983

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[20] Throughout the proceedings, defendants' counsel, in the most trying of circumstances, conducted himself professionally and courteously.

conviction, including whether Father Bourgeois entered the military reservation at night, got up in a tree, and used a loud speaker to broadcast a recorded message. *Id.* Judge Elliott also strongly criticized Father Bourgeois for entering the base without permission and wearing a military uniform while he was not a member of the United States Army. *Id.*

Circuit courts of appeal have repeatedly held that a trial judge's demeaning or one-sided interjections are improper. *See e.g., Chantal*, 902 F.2d at 1019-20; *United States v. Hickman*, 592 F.2d 931, 932-34 (6th Cir. 1979); *Nicodemus*, 596 F.2d at 155-157; *United States v. Sheldon*, 544 F.2d 213, 218-19 (5th Cir. 1976). During the 1991 trial, however, in addition to underscoring government witnesses testimony and cross-examining defendants unnecessarily, the district judge frequently editorialized on important issues, stated his lack of interest in defense testimony, and engaged in assertive pro-prosecution dialogue. Even before the 1991 trial commenced, Judge Elliott threatened to issue bench warrants for defendants' arrest before the entire jury venire because they were unavoidably detained at the metal detector on the first floor of the courthouse. 1991 Trans. at 3-4.

During the government's cross-examination of Father Bourgeois, the prosecutor asked whether he was aware that his actions would damage the property.

> The Witness: When I threw the blood, all I could think of was Selena, Elgar, this is for your. I *didn't think about doing damage* to that –.
>
> The Court: Answer his question.
>
> The Witness: I thought I was.

The Court: No, you're not answering the questions.

The Witness: All I could think of was that young girl, she is 16 years old. . . .

The Court: Just a moment. The question was, did you know that that was going to damage the property that you were throwing blood on, didn't you know that, the carpet and the pictures and everything else. Didn't you know that would damage the property. That's what he was asking. Now answer the question.

The Witness: Yes, but insignificant damage to the others, the people who were really damaged.

1991 Trans. at 260-61 (emphasis added).

The district judge, during that interrogation, interrupted Father Bourgeois as he was explaining that he did not think about whether or not he was doing damage to the property as he threw the blood, and on-point answer to the prosecutor's question. He then, through belittling interrogation, clearly sided with the prosecution as to the disputed essential element of the crime. The judge's overbearing behavior demonstrated to the jury that he was willing to assist the prosecution without their request, and he held in disdain the defense and Father Bourgeois.

Judge Elliott's most outrageous conduct occurred during the direct examination of Charles Liteky. At the outset of his direct examination, Liteky sought to provide basic background information about himself. When he sought to testify that he was in Vietnam during the Vietnam war, the Court interrupted to say that "all your experiences in Vietnam and all of that, how that may

have affected your life and so on, that has nothing to do with the trial of this case.[21] 1991 Trans. at 210. When Liteky explained that he was trying to establish his background and that his background, in turn, had a lot to do with his state of mind at the time of the alleged criminal activity, the Court irately responded:

The Court: You are the person named in this Indictment, aren't you?

Mr. Charles Liteky: I am, Your Honor.

The Court: All right. That's who you are. Now –

Mr. Charles Liteky: And that's all I am?

The Court: Let's go ahead with the trial of this case.

1991 Trans. at 211.[22]

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[21] Judge Elliott's ruling was erroneous. A defendant-witness has the right to present evidence of specific instances of conduct demonstrating good character. *United States v. Powers*, 622 F.2d 317, 324 n. 10 (8th Cir.), *cert. denied*, 449 U.S. 837 (1980); *United States v. Giese*, 597 F.2d 1170, 1190 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

[22] Following this confrontation, Father Bourgeois' attorney made motions for a mistrial and, alternatively, for severance. claiming:

> It's impossible for my client, Father Bourgeois, to get a fair trial when he is joined in a case with a defendant where you are treating the defendant in a very demeaning manner. You are blocking what I would view as admissible testimony and arguing with him and basically telling him that he is nothing other than the name in the indictment. I don't think my client can get a fair trial in a courtroom where the judge is acting

The district judge's action not only had the effect of impermissibly cutting off Liteky's background testimony, his remark that the defendant was nothing more than the person named in the Indictment was unnecessarily demeaning. The judge implied that Liteky's only relevant background experience was that he had been charged with a crime.[23]

In addition to his hostile and demeaning comments toward defendants, the district judge also refused to allow the defendants to testify about the events which impacted their state of mind. Judge Elliott's stubborn refusal to permit the defendants to testify about what occurred in El Salvador is particularly ironic in that he repeatedly permitted the government to introduce evidence and exhibits which explained the defendants' motives for their protest at the School of the Americas. 1991 Trans. at 196, 197, 199, 200. The fact that the judge permitted the government to introduce evidence pertaining to defendants' state of mind, yet repeatedly denied defendants the opportunity to explain that their actions were the product of a righteous fervor, rather than a conscious decision to destroy government property, evidenced one-sidedness and pro-government sentiment.

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that way toward a codefendant who is a close associate and friend of his.
1991 Trans. at 212.

[23] The judge only exacerbated the effect of his prejudicial conduct when, following the discussion with Liteky about his background experience, he referred to Liteky as "Mr. Defendant." 1991 Trans. at 213.

The defendants were charged with violating 18 U.S.C. § 1361, which requires proof the defendants *willfully* injured government property. 18 U.S.C. § 1361 is, therefore, a specific intent crime. *United States v. Jones*, 607 F.2d 269, 273-74 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). Because specific intent is an essential element of the crime with which defendants were charged, they should not be deprived of the opportunity to deny that they operated with specific intent, or to offer any possible explanation for their conduct. *United States v. Bowen*, 421 F.2d 193, 197 (4th Cir. 1970). *Cf. Cheek v. United States*, 498 U.S. 192, 204-05 (1992) (evidence of good faith belief in lawfulness of action, even if unreasonable, is relevant to whether act was "willful").

When combined with all of Judge Elliott's similarly improper conduct throughout the 1991 trial, his refusal to permit *mens rea* testimony could reasonably give rise to an appearance of impropriety in the eyes of an objective observer. Indeed, objective trial courts routinely permit criminal defendants to testify fully about their state of mind at the time they engaged in the conduct for which they were later charged. *See, e.g., United States v. Tijerina*, 446 F.2d 675 (10th Cir. 1971); *United States v. Hawk*, 497 F.2d 365 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974); *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971); *United States v. Malinowski*, 472 F.2d 850 (3rd Cir.), *cert. denied*, 411 U.S. 970 (1973).

3. Judge Elliott's Conduct Following the 1991 Trial Solidifies an Appearance of Impropriety and Risks Undermining the Public's Confidence in the Judicial Process

A district judge's actions post trial are relevant to demonstrate appearance of bias. *Cf. Bland*, 697 F.2d at 266 (post trial actions relevant to fair trial inquiry). In reversing defendant's convictions and remanding for retrial, the *Bland* court recognized that a judge's conduct after sentencing "concededly cannot be deemed prejudicial; however, [it could] indirectly reveal the judge's feelings throughout the trial." *Id.*

At sentencing, an attorney appearing for defendants informed the court that defendants intended to file an appeal. Rather than addressing procedural issues important to the impending appeal, Judge Elliott snapped "he can do whatever he wants to do." 1991 Trans. at 372. Defendants' attorney also indicated that the defendants intended to appeal *in forma pauperis* and certain questions therefore needed to be addressed at that time. The Court, however, refused to address the issue. 1991 Trans. at 372, 379. In fact, Judge Elliott later refused to allow appeal *in forma pauperis* at all, abstrusely finding "no probable cause." Order (June 27, 1991) (Addendum, p. 1-3). The Eleventh Circuit, by Order of November 5, 1991, directly ordered Judge Elliott to permit defendants' appeal to proceed *in forma pauperis*. Order, (Nov. 5, 1991) (Appendix to Pet. for Cert. at A4). Despite this direct order, Judge Elliott refused to sign the CJA-24 form permitting appeal *in forma pauperis*. Letter from Gregory J. Leonard to Miguel J. Cortez (Dec. 9, 1991) (Addendum, p. 4). Judge Elliott's actions following defendants' convictions reflect

the extent to which his strongly held opinions against the defendants have festered since the 1983 trial. In this respect, Judge Elliott's conduct bears a startling resemblance to his behavior in *Clark*, 990 F.2d at 1229. In that case, the Eleventh Circuit exercised its inherent authority and disqualified Judge Elliott from any involvement in future proceedings because it felt that he "would have difficulty putting his previous views and findings aside." *Id.* at 1230.

Judge Elliott's conduct at the 1983 trial, the 1991 trial and during the events subsequent to the 1991 trial all give rise to a question as to his impartiality in this matter. As such, defendants' convictions should be reversed and their case remanded for a new trial before an impartial judge.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court reverse their convictions and remand their case for retrial before an impartial judge or, in the alternative, reverse their convictions and remand this case to the Eleventh Circuit for a determination as to whether Judge Elliott should have recused himself under 28 U.S.C. § 455(a) for judicially acquired appearance of bias.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	*	
	*	CRIMINAL NO.
vs.	*	91-93-COL
JOHN PATRICK LITEKY,	*	
	*	
Defendant	*	

ORDER

Determining that there is not probable cause for appeal in the case above identified, the Court declines to authorize appeal in forma pauperis.

IT IS SO ORDERED, this 27th day of June, 1991.

/s/ J. Robert Elliott
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	*	
vs.	*	CRIMINAL NO.
ROY LAWRENCE BOURGEOIS,	*	91-93-COL
Defendant	*	
	*	

ORDER

Determining that there is not probable cause for appeal in the case above identified, the Court declines to authorize appeal in forma pauperis.

IT IS SO ORDERED, this 27th day of June, 1991.

/s/ J. Robert Elliott
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	*	
vs.	*	CRIMINAL NO.
CHARLES JOSEPH LITEKY,	*	91-93-COL
Defendant	*	
	*	

ORDER

Determining that there is not probable cause for appeal in the case above identified, the Court declines to authorize appeal in forma pauperis.

IT IS SO ORDERED, this 27th day of June, 1991.

/s/ J. Robert Elliott
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Office of the Clerk
Middle District of Georgia
P. O. Box 124
Columbus, Georgia 31902

December 9, 1991

Miguel J. Cortez, Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: USA v. Liteky
USCA Division No. 91-8577
USDC Docket No. 91-91-CR-COL

ATTENTION: WENDI MASON

Dear Wendi:

Enclosed please find a CJA 24 form sent to this office by the attorney for the Defendant in the above-captioned case. Mr. Thompson has requested that we have Judge Elliott sign same approving payment for a transcript.

Due to the fact that Judge Elliott has denied IFP status for the appeal, he has given me instructions that he will not sign the CJA-24 authorizing payment. Since the Eleventh Circuit authorized the appeal IFP and not Judge Elliott, it should be submitted to the Circuit Court for their consideration.

Should you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,
GREGORY J. LEONARD, CLERK

BY: /s/ Carolyn H. Fryer
Carolyn H. Fryer
Deputy Clerk

/chf
Enclosures

cc: Paul Alexander
✔ Peter Thompson
Pete Peterman
Gregory J. Leonard, Clerk, USDC